MAY 1 195
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 790

GWENDOLYN YOUNG HEYWORTH KOCH,
Petitioner,

vs.

MARGARET DE KORWIN, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA DE KORWIN, DECEASED,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

CRANSTON SPRAY,
WINFIELD T. DURBIN,
Chicago, Illinois,
Attorneys for Gwendolyn Young Heyworth Koch,

Of Counsel:
MACLEISH, SPRAY, PRICE & UNDERWOOD,
134 South La Salle Street,
Chicago, Illinois.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

INDEX.

PAGE

Statement of the Matter Involved 1

Opinions Below 7

Statement as to the Jurisdiction of This Court 7

The Questions Presented 8

Reasons Relied on for Allowance of Writ 9

Summary 9

I. The Court of Appeals has attempted an important and far-reaching extension of diversity jurisdiction in conflict with prior decisions of this Court and other Courts of Appeal 10

(a) The Importance of the Decision Below 10

(b) The Dilemma as to the Jurisdiction of the District Court 13

(c) The Decision Affirms a Decree Which Purports to Establish Rights in Absent Parties Contrary to Decisions of This Court and in Other Circuits 15

(d) In Holding That the Absent Parties-Plaintiff Were Not Indispensable the Decision Improperly Extends Diversity Jurisdiction Far Beyond Previous Limits 19

The Decision May be Taken as Holding That Lack of Jurisdiction is Cured by a Decision Favorable to Absent Parties 19

Whether Plaintiff's Interests are Separate From Those of Absent Parties 20

A Final Disposition Without All Parties Present as Inconsistent with Equity and Good Conscience 24

II. By construing the remainder interests to be vested, the Court of Appeals has decided an important issue of local law in a manner in conflict with applicable local decisions 26

Cases Cited.

Armstrong v. Lear, 8 Peters (33 U. S.) 52 23
Baird v. Peoples Bank & Trust Co., 120 F. (2d) 1001 (C. C. A. 3, 1941) 23
Bigelow v. Old Dominion Copper Co., 225 U. S. 111 ... 15
Board of Trustees of Oberlin College v. Blair, 70 F. 414 23
Calcote v. Texas-Pacific Coal & Oil Co., 157 F. (2d) 216 (C. C. A. 5, 1946) 18, 20
Commonwealth Trust Co. v. Smith, 266 U. S. 152 22
Crutcher v. Joyce, 134 F. (2d) 809 (C. C. A. 10, 1943) 21
Cummings v. Hamilton, 220 Ill. 480 .....30, 32, 33
deKorwin v. First National Bank, 156 F. (2d) 858, 860 ..... 4, 5
Fleshner v. Fleshner, 378 Ill. 536 30
Franz v. Buder, 11 F. (2d) 854 (C. C. A. 8) 23
Graff v. Rankin, 250 F. 150 (C. C. A. 7, 1918) 30, 32, 33
Gregory v. Stetson, 133 U. S. 579 22
Horn v. Lockhart, 17 Wall. (84 U. S.) 570 21
Keegan v. Humble Oil Co., 155 F. 971 (C. C. A. 5) 22
Kentucky Natural Gas Corporation v. Duggins, 165 F. (2d) 1011 (C. C. A. 6) 22
Knight v. Pottgieser, 176 Ill. 368 31
Northern Trust Co. v. Wheaton, 294 Ill. 606 31
Orr v. Yates, 209 Ill. 222 31
Payne v. Hook, 7 Wall. (74 U. S.) 425 21
Peadro v. Peadro, 400 Ill. 482 33
People v. Byrd, 253 Ill. 223 .....28, 29, 30, 31, 32, 33, 34
Pingrey v. Rulon, 246 Ill. 109 31

Powell v. Young, U. S. S. Ct. No. 688, Oct. Term, 1949 .....2, 9, 16, 18, 19, 20, 21, 22
Riley v. Webb, 272 Ill. 537, 538, 539 .....13, 15
Roos v. Texas Company, 23 F. (2d) 171 (C. C. A. 2) .. 24
Sadler v. Sadler, 167 F. (2d) (C. C. A. 9, 1948) 9, 17
Shields v. Barrow, 17 How. (58 U. S.) 130 .....14, 19, 22
Siddons v. Cockrell, 31 Ill. 653 .....31, 32
Smith v. West, 103 Ill. 332 31
Thomas v. Pullman Trust & Savings Bank, 371 Ill. 577, 585 34
Vincent Oil Co. v. Gulf Refining Co., 195 F. 434 (C. C. A. 5) 22
Warrington v. Chester, 294 Ill. 524 .....30, 33
Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33 .....14, 16, 21
White v. White, 312 Ill. App. 628 .....30, 32
Young v. Garrett, 149 F. (2d) 223 (C. C. A. 8) 24
Young v. Powell, 179 F. (2d) 147 (C. C. A. 5, 1950) 2, 9, 16, 18, 19, 20, 21, 22, 23

MISCELLANEOUS.

Federal Rules of Civil Procedure, Rules 19(b), 82 14
Freeman on Judgments (5 ed.) Sec. 428 15
Restatement of Law of Judgments, Sec. 93,103 15
Restatement of Future Interests, Sec. 254, 250 27
Kales, Estates & Future Interests, Sec. 521, 519, 520 .. 28
Illinois Rev. Stats. Ch. 110, Sec. 138 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. .....

GWENDOLYN YOUNG HEYWORTH KOCH,
Petitioner,

vs.

MARGARET DE KORWIN, INDIVIDUALLY AND AS EXECUTRIX OF THE WILL OF JOSEPH MARIA DE KORWIN, DECEASED,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Gwendolyn Young Heyworth Koch, by her attorneys, respectfully shows:

There are involved here important matters of federal jurisdiction in which the decision below is contrary to decisions of this Court and in other circuits. The Court of Appeals has affirmed a decree which extends its benefits to absent parties (whose presence would defeat diversity jurisdiction) contrary to the principle of mutuality. It also has apparently determined that absence of indis-

pensable parties is cured by a decision favorable to the absent parties. In any view the action of the Court of Appeals extends federal jurisdiction beyond previous limits. The decision in particular is contrary to the recent decision in the Fifth Circuit in *Young* v. *Powell*, Petition for Certiorari filed March 17, 1950, No. 688, as well as prior decisions in that Circuit.

There is also involved the question whether the Court of Appeals properly decided an important question of local law. Petitioner submits that it is manifest from a consideration of the majority opinion below, together with a few of the cases cited in the opinion, that the majority misunderstood and unintentionally repudiated a certain important and well settled local rule of construction in the determination of whether remainder interests under a will were vested or contingent on survival, with the result that a breach now exists between the law as applied in the state and federal courts.

Petitioner calls attention to the fact that a petition for certiorari has been filed by eight other defendants, also beneficiaries of the trust under the will of Otto Young (Case Nos. 771, 772, 773) and the record in that case is the basis for the present petition. Petitioner fully subscribes to the position there taken, in addition to urging the matters hereinafter set forth.

* * * * *

To understand what is involved under the jurisdictional point a brief review of the litigation and parties is necessary.

The original plaintiff was Joseph Maria De Korwin, otherwise known as Count Korwin-Sokolowski (R. 2), a citizen of Poland. He was the second husband of Selma Cecile, one of the four daughters of Otto Young who died in 1906 (R. 276) leaving a will disposing of an estate of

real and personal property located in Illinois which is now valued for the purposes of this case at approximately $35,000,000 (R. 303-4).

DeKorwin and Selma Cecile were married in 1911 and divorced in 1921. There was one child of this marriage, Stanislaus Stephen deKorwin, sometimes known as Stanley Young, who, in 1940, died domiciled in Illinois, intestate and without issue, leaving as his three heirs (1) his father, the original plaintiff, (2) his half-sister, Gwendolyn Young Heyworth Koch (this petitioner), and (3) his widow, Ruth Jacobi Young.

Stanley Young was the second grandchild of Otto Young to die. In 1936 Otto Young Heyworth, a child of Selma Cecile by her first marriage, had also died domiciled in Illinois, intestate and without issue, leaving as his five heirs (1) his father, Lawrence Heyworth, (2) his sister, your petitioner, (3) a half-brother, Lawrence Heyworth, Jr., (4) his half-brother, Stanley Young, referred to in the next preceding paragraph, and (5) his widow, Evelyn Heyworth (R. 277).

During the present litigation Count deKorwin died and the suit was continued by his widow, Margaret deKorwin, as executrix and individually. She is the respondent to the present petition, but for convenience reference will be made throughout to the original plaintiff.

The plaintiff's initial complaint sought a share of the Otto Young estate by way of total intestacy as an heir of an heir by attacking the will as violating the rule against perpetuities. It also presented two alternative claims to a smaller share based on a claimed partial intestacy and on a construction of the gift in remainder to issue of grandchildren who might have died as a gift to heirs. The original and the several amended complaints also challenged, as a matter of construction of the will and the application

of state and federal statutes, the trusteeship of The First National Bank of Chicago (156 F. 2d 858, 859, 860; R. 441; record in this Court in *First National Bank* v. *deKorwin*, October term 1946 No. 696, pages 3-21).*

Jurisdiction under the original complaint was challenged on the ground that, upon a proper realignment of the parties, Illinois citizens named as defendants, being the surviving heirs of Stanley Young and Otto Young Heyworth other than your petitioner, became aligned on the side of the plaintiff and opposed to other Illinois citizens, thereby destroying diversity of citizenship jurisdiction. The plaintiff thereupon moved to dismiss these parties. The District Court denied the motion and dismissed the cause for lack of jurisdiction. The Court of Appeals reversed, holding that the persons in question were not indispensable, for the reason that by limiting the relief granted a decree could be entered upon the original complaint which would not affect the rights of the absentees (156 F. 2d 858).

Petition for writ of certiorari to this Court from the first decision of the Court of Appeals in the instant case was denied, 329 U. S. 795.

Thereafter the plaintiff with leave of court filed a second amended complaint and proceeded to trial upon an entirely different theory in attempting to establish an interest in the estate (R. 298). Instead of seeking to recover a portion of the corpus of the trust as intestate property, plaintiff now claimed that under a proper construction of the will his deceased intestate son was given a vested remainder in fee in the corpus of the trust along with all the other grandchildren (eighteen in number in the ag-

* The original complaint was incorporated in the unprinted record, certified to the Court of Appeals, but was not included in the printed record because covered by stipulation of the parties permitting reference to such prior record without reprinting, R. 480-481.

gregate) and that the plaintiff as an heir of his son had inherited a portion of that interest (R. 132-150).

The answers of the trustee and the adult defendants (all the living grandchildren) put this claim in issue, contending that under a proper construction of Otto Young's will the remainders to grandchildren were not vested but contingent upon the survival of such grandchildren to the termination of the trust (R. 186, 195, 212). Petitioner opposed the plaintiff's contention. Although she was an heir of both deceased grandchildren, the setting up of two additional shares would also have reduced somewhat her own share as a grandchild.

The plaintiff in his second amended complaint did not join either as plaintiffs or defendants those citizens of Illinois (See *deKorwin* v. *First National Bank,* 156 F. 2d 858, 860) who had been dismissed out after the first decision of the Court of Appeals, and who if they had remained in the case and had been properly aligned would have been on the side of the plaintiff (R. 263, 264, 277), viz.: four of the persons hereinbefore named as heirs of Stanley Young and Otto Young Heyworth (*i. e.,* Ruth Jacobi Young, Evelyn Heyworth, Lawrence Heyworth, and Lawrence Heyworth, Jr.) as well as Metropolitan Trust Company of Chicago, present administrator of the estate of Stanley Young, and The Northern Trust Company of Chicago, the administrator of the estate of Otto Young Heyworth (R. 263).

The several answers preserved the question of lack of jurisdiction (R. 186, 200, 212) but the District Court proceeded to decide the case on the merits. The decree made a general determination that the remainders were vested and that the share of any grandchild who died without issue before the termination of the trust is a transmissible interest descending to his heirs, devisees and legatees. The decree was not limited to the plaintiff or

without prejudice to the position of absent parties but declared that they had interests in the trust and appeared even to contemplate a distribution to them under the retained jurisdiction of the court (R. 399, 431). Salient portions of the decree are quoted *infra*.

The District Court also held that the trustee acting under the will, The First National Bank of Chicago, which had succeeded to the trusteeship following a consolidation in 1929 of two state banks and a consolidation in 1933 with a national bank, had not, under the Court's construction of the will, properly succeeded to the trusteeship; held that the trusteeship was vacant; ordered an accounting; and retained jurisdiction to appoint a successor trustee (R. 422-430).

The trustee and all of the adult defendants appealed, assigning as error, among others, the lack of jurisdiction and omission of indispensable parties, and included the point in their briefs (R. 448, 455, 465).

On appeal the Court of Appeals unanimously reversed the decree on the trusteeship point but, with one Judge dissenting, affirmed the remainder of the decree. While it did not comment on the jurisdictional question, it necessarily held that the District Court had jurisdiction and that the decree reviewed was proper within the principles laid down in the opinion on the first appeal.

It is petitioner's position that the above named persons who were dismissed as defendants after the first appeal, are indispensable parties under the issues finally submitted to the court and that the decree, which declared the rights of absent persons similarly situated to the plaintiff, could not do so without those persons being parties even if they were not indispensable to the issues.

It is contended that in affirming the decree the Court of Appeals for the Seventh Circuit decided important ques-

tions of federal jurisdiction contrary to decisions of this Court and in other circuits and contrary to the law of Illinois; and that in the decision on the merits the Court of Appeals decided an important issue of local law in a way in conflict with applicable local decisions.

OPINIONS BELOW.

The opinion of Judge Igoe (R. 399) is reported 84 F. Supp. 918.

The opinion of the Court of Appeals (R. 484) is reported 179 F. 2d 347.

STATEMENT AS TO THE JURISDICTION OF THIS COURT.

The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code, Act of June 25, 1948, Chapter 646, 62 Stat. * * *, 28 U. S. C. Section 1254 (1).

The decision of the Court of Appeals was rendered December 30, 1949 (R. 484).

Petition for rehearing duly filed was denied February 1, 1950 (R. 643).

THE QUESTIONS PRESENTED.

1. Whether, in view of the general principle of mutuality in the estoppel of judgments, a Federal District Court can properly declare rights in absent parties who would not have been bound by an adverse decision (and whose presence would have destroyed diversity jurisdiction).

2. Whether in the federal courts a lack of indispensable parties (whose presence would defeat diversity jurisdiction) is cured by a decision on the merits favorable to the absentees.

3. Whether for purposes of diversity jurisdiction absent parties (whose presence would destroy the diversity) having the same interests as the plaintiff are indispensable where, among other things, (a) some of them are co-heirs with the plaintiff interested in a decedent's estate, and plaintiff asserts (in a suit against the trustee and beneficiaries of a trust in which the decedent was a beneficiary) that the decedent's estate owns a share of the trust corpus, subject to life estates, because decedent had a vested interest in the trust; (b) said vested interest is asserted under an interpretation of the trust instrument (a will) which will determine the character of the interests (as vested) of other beneficiaries, will establish interests in heirs of another deceased beneficiary, and will reduce the interests of living beneficiaries; and (c) plaintiff also asks to have the will construed to determine whether the acting trustee is entitled to continue as trustee.

4. Whether in holding the remainder interests of the grandchildren in the trust vested rather than contingent on survival, the Court of Appeals properly refused to apply a local rule of construction of future interests limitations which had been applied by the Illinois courts on three occasions and by the Court of Appeals itself on one prior occasion and had never previously been distinguished or refused application by either court.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The writ should be allowed for the following reasons, certain of which are stated more fully in the subsequent portion of the petition:

I. The decision of the Court of Appeals is in conflict with decisions of this Court and with decisions in other circuits (cited *infra*) in these several respects (and conflicts with the recent decision of the Fifth Circuit in *Young* v. *Powell*, petition filed March 17, 1950, No. 688, in all of the following respects):

(1) in approving a decree that purports to establish rights in absent parties who would not have been bound by an adverse decision (and whose presence would have destroyed diversity jurisdiction), following the decision of the Ninth Circuit in *Sadler* v. *Sadler*, 167 F. 2d 1 (1948), in violation of the long established principle of mutuality in the estoppel of judgments;

(2) in apparently adopting the similar notion, opposed to the principle of mutuality, that diversity jurisdiction depends on the decision on the merits and that lack of indispensable parties can be cured by a decision favorable to the absentees;

(3) in holding that absent parties having joint interests with plaintiff are not indispensable because their presence would defeat diversity jurisdiction where, among other things, some of them are co-heirs with plaintiff interested in the estate of a deceased trust beneficiary, a grandchild of the maker of the trust, and plaintiff asserts that the estate has an interest in the trust because all of the grandchildren of the decedent had vested rather than contingent interests in the trust, where the other absentees are heirs of another deceased grandchild, and where plaintiff also asserts that under a proper construction of the instrument of trust the acting trustee is not entitled to continue and is liable to the trust; and

(4) in deciding each of the above questions in a manner also contrary to local law.

II. The Court of Appeals has decided an important issue of local law in a way in conflict with applicable local decisions. The local rule is involved where there is a disposition of a future interest to remaindermen not described initially as survivors but so described in subsequent words providing for a substitutional gift to issue of a deceased remainderman, where the reference is to the share which the remainderman (parent) would have taken "if then living", or the like. The local rule is that these words are the equivalent of an initial gift to remaindermen "then living" and are an express provision for contingency making resort to other rules of construction or to inferences of intention unnecessary. The decision of the Court of Appeals refusing to apply the rule creates an important breach between the law in the state courts and in the federal courts and will unsettle many titles and previous dispositions. The fact that four cases have been appealed and decided in Illinois involving the rule since 1905 indicates that there are many other instances where litigation has so far been avoided because the rule was regarded as settled.

I.

THE COURT OF APPEALS HAS ATTEMPTED AN IMPORTANT AND FAR-REACHING EXTENSION OF DIVERSITY JURISDICTION IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF APPEAL.

(a) The Importance of the Decision Below.

The prior decision of the Court of Appeals on the jurisdictional question which was involved at that time has received wide attention.* It is likely that the second deci-

* See for example Moore's Federal Practice 2d Ed. Sec. 19-08 note 16.

sion, being a sequel to the first, will have far-reaching effects. (Review is also necessary for the further conduct of this litigation and to prevent another appeal and petition on questions of federal jurisdiction.)

A simplified statement of the facts shows the peculiar result reached. Plaintiff claimed that a deceased beneficiary of a testamentary trust administered by an Illinois trustee had a vested interest in the trust property so that plaintiff, having an interest as heir in the estate of the beneficiary, was entitled to a share in the trust on its future termination and to a present accounting from the trustee. The deceased beneficiary was plaintiff's son who had died, while domiciled in Illinois, intestate and without issue but leaving surviving a widow and plaintiff. The widow was entitled under Illinois law to all of the personal property of decedent after claims of creditors and to one-half of the real estate (Ill. Rev. Stat., Chap. 3, Sec. 162). The presence in the suit of the widow or the administrator, being citizens of Illinois, would have defeated diversity jurisdiction. Over continuing objections of the defendants the District Court proceeded without them, construed the will, and decided not merely that the plaintiff had an interest, but that the *estate* of the deceased beneficiary and persons interested therein had an interest in the trust. The decree determined the rights of the widow and administrator and apparently invited them to come into court and obtain the benefit of the victory. There was in fact another beneficiary (Otto Young Heyworth) domiciled in Illinois who had died under identical circumstances, and the decree also extended the benefits and the invitation to other Illinois citizens interested in the estate of this second deceased beneficiary, none of whom were parties.

Thus the situation is presented of two or more persons having a common claim as co-heirs of a deceased beneficiary to ownership of an undivided share of a trust.

One sues to establish the share and the others stay on the sidelines. If the plaintiff loses, the absent coheirs are not bound but can bring the defendants into court a second time and try again. If the first plaintiff wins, there are basically two alternatives, assuming jurisdiction.

One is that the decree establishes rights in the absent plaintiffs. This is what the decree in the instant case provides. But a rule permitting such decrees is opposed to the rule of mutuality in the estoppel of judgments. It would make diversity jurisdiction the means whereby multiple plaintiffs have an unconscionable advantage over defendants (and without necessarily eliminating further litigation because the court is unable to decide questions existing between the plaintiffs). The defendant is required to win the case twice, if not more often, once in a federal and once in a state court, whereas one victory for the plaintiffs' side extends to all and the defendant has no second chance. A number of plaintiffs could agree to divide the costs and proceeds of several suits and could then sue one at a time in different courts until some one of them was successful.

The only other alternative, if jurisdiction must be assumed, is to stop with a decree that leaves untouched the interests of the absent plaintiffs. But this is impossible, as recognized in decisions holding that such interests are not separable. Such a decision, moreover, leaves the controversy in confusion. (For one thing there would usually be a serious question whether the decree is sufficiently limited. Further litigation over jurisdictional matters would be likely.) The plaintiff himself will need a division of the property and further relief in a state court. Such a decision does not even establish the character of the remainder interests of the defendant grandchildren for their own purposes or as between them and the trustee. The other plaintiffs will necessarily bring a subsequent suit or

suits in an attempt to duplicate the first plaintiff's success. An opposite result may possibly be reached, adding to the confusion. This is the consequence of a rule sustaining jurisdiction to enter *any* decree.

It also follows as an incident of the decision that if the District Court in this case had jurisdiction to enter any decree, the federal courts have quasi-probate jurisdiction in every case where a third person owes money or holds property belonging to an estate and there is at least one heir or legatee who is a citizen of a different state than the debtor. In fact, if local heirs can join in after the first decree in a suit against an administrator for an accounting and distribution the federal courts become courts of probate.

It also follows that the federal courts will be available on behalf of one of several persons to construe or set aside a contract, will, or trust instrument, leaving it in effect or with a different meaning as to the others. Apparently it can even be determined that one person is trustee as to some beneficiaries whereas there is another trustee of the same property as to others.

Yet the state courts here had jurisdiction to adjudicate the rights of all persons interested in the trust under the will and to give complete relief in one proceeding.

(b) The Dilemma as to the Jurisdiction of the District Court.

In a suit such as this in an Illinois court all persons interested in the controversy on either side must be parties to the suit. *Riley* v. *Webb*, 272 Ill. 537. This is the usual state rule. The court can thus give complete relief and can establish rights in the property or *in rem* and not just between a plaintiff on one side and defendants on the other side. Where the court has jurisdiction of the prop-

erty, persons outside the jurisdiction can be notified and their rights determined. (Ill. Rev. St. Ch. 110, Sec. 138.)

Federal court decisions have made a distinction between the requirements of state and federal jurisdiction where there are persons whose presence would destroy the federal jurisdiction. It is said that such persons, while necessary parties, are not indispensable if the court can proceed without them. This is the substance of Rule 19(b).*** For this purpose an indispensable party is a person who has such an interest that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination will be wholly inconsistent with equity and good conscience. *Shields* v. *Barrow,* 17 How. (58 U. S.) 130.

Whether a determination of the rights of the plaintiff will affect the interests of absent plaintiffs depends on whether their interests are "separable." *Shields* v. *Barrow, supra.* The decisions establish that in some instances the interests of co-heirs are separable and in some they are not. If they are not separable, there is no jurisdiction to enter *any* decree.

If the interests are separable the decree itself must be explicitly limited so as to establish only the rights of plaintiffs actually before the court and must show on its face that the rights of absent plaintiffs are unaffected and must be established in another suit. *Waterman* v. *Canal-Louisiana Bank Company,* 215 U. S. 33.

Hence this dilemma is presented in cases such as the present. If the absent plaintiffs had interests which were not separable, they were indispensable parties. But even if they were dispensable the decree would have to provide that it was not a determination of the vested-contingent question in the case of absent parties. Such a decree would

*** The Rules of Civil Procedure do not extend or limit jurisdiction, Rule 82.

be self-contradictory because of the nature of plaintiff's claim and would leave the controversy in a condition inconsistent with equity and good conscience, so that for this reason the parties were indispensable, the interests were not separable, and the court was without jurisdiction.

Petitioner's position accordingly is basically that the interests were not separable, that an artificially limited decree is impossible or would be contrary to equity and good conscience, and that the District Court had no jurisdiction.

(c) The Decision Affirms a Decree Which Purports to Establish Rights in Absent Parties Contrary to Decisions of This Court and in Other Circuits.

The decision of the Court of Appeals affirming the decree on the vesting question gives relief to absent parties who would not have been bound by an adverse decision (and whose presence would defeat diversity of citizenship jurisdiction), contrary to the basic requirement of mutuality, which is both federal and Illinois law. *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111; *Riley* v. *Webb*, 272 Ill. 537, 538, 539; Freeman on Judgments (5 Ed.) Sec. 428; See Restatement of the Law of Judgments, Sec. 93 and 103.

A decree not only is not *res judicata* in favor of absent (and unrepresented) parties, but it must be expressly limited so as not to purport to adjudicate the rights of absent parties That the test of a decree is not what the decree can do but what it purports to do is apparent from the numerous statements in the federal decisions, in considering the possibility of an adverse decree, that it must not "injuriously affect" the rights of absent parties where it is, of course, clear that no decree could actually bind absentees. The decree must not be a cloud on the rights of absent parties nor a cloud on the rights of present

parties as against absent parties, whether the absentees are plaintiffs or defendants.

In the specific situation, among the various combinations, where the absent parties are plaintiffs and the decision is favorable, the precise question has been decided in conflict with the decision below by the 5th Circuit in the recent decision in *Young* v. *Powell*, 179 F. (2d) 147, Petition for Certiorari filed March 17, 1950, No. 688, discussed below.

The instant decision is also in conflict with *Waterman* v. *Canal-Louisiana Bank Co.*, 215 U. S. 33. There, in stating the distinction between necessary and indispensable parties, the Court said (p. 48):

> "• • • provided, in the case of necessary parties, their interests are such and so far separable from those of parties before the court, that the decree can be so shaped that the rights of those actually before the court may be determined without necessarily affecting other persons not within the jurisdiction."

Referring specifically to the relief which might be given there without affecting the interest of the absent party, Davis, the Court said:

> "If it finds the issue in favor of the complainant, it may proceed to determine the proportion in which the complainant and the Watermans are entitled to share, without prejudice to the rights of Davis. It may direct the retention of his share in the hands of the executors, to be adjudicated in some other suit, or may otherwise shape its relief so as to do justice to the parties before the court without affecting his interest."

In other words, the decree must explicitly limit its operation to the persons before the court and the decree itself must state that it is not determining the rights of absent parties.

The decree in the instant case contained the following provisions:

"* * * The gifts in remainder made by Otto Young in his last will and testament to his grandchildren are vested estates, * * * and the share in such testamentary trust estate of any grandchild who dies without issue before termination of the trust is a transmissible interest and descends to his heirs, devisees and legatees" (R. 430).

* * * * *

"* * * jurisdiction of this cause is expressly retained * * * to fix the amount of proportional contributions to plaintiff's counsel out of their remainders from such heirs, legatees and devisees of Otto Young's grandchildren dying without issue before termination of the trust as may accept the benefit of services rendered by plaintiff's counsel in creating and preserving such interests, either by applying for or by receiving their share in the vested estates herein established; and to appoint a permanent successor or successors in trust of said trust" (R. 432).

The instant decree nowhere contains any limiting language. It declares the rights of the absent plaintiffs and refers to plaintiff's counsel having "created and preserved" remainder interests in other heirs of deceased grandchildren. It even appears to invite the absent parties to come into court and claim the benefit of the decision. The decree contemplates retention of jurisdiction, perhaps for the purpose of ultimately decreeing a distribution to all beneficiaries including the absent parties.

Yet this is not an isolated departure from the rule of mutuality by the Court of Appeals for the 7th Circuit. A similar decree was approved in *Sadler* v. *Sadler,* 167 F. (2d) 1 (C. C. A. 9, 1948). This is closely related to the erroneous notion that a jurisdictional defect due to absence of parties is cured by a decision in favor of those parties.

The danger inherent in the rule put into effect by the Court of Appeals in affirming this portion of the decree is well stated in the recent decision of the Court of Appeals

for the 5th Circuit in *Young* v. *Powell*, 179 F. (2d) 147, Petition for Certiorari No. 688, filed March 17, 1950. Following its prior decision in *Calcote* v. *Texas-Pacific Coal & Oil Co.*, 157 F. (2d) 216 (Cert. den. 329 U. S. 728, 830), the Court said:

> "Such view would permit the continual harassment of the defendant by successive suits brought singly by interested parties, each in the interest of them all, for cancellation with no protection, in case the defendant wins, from successive suits by the others who had not been made parties, while in case he lost in the first suit, his complaint that he ought not to have suffered a judgment in favor of persons who were not sued, would be met by the cynical view, 'Well, those who ought to have been in the suit haven't suffered because their interests have prevailed, and having lost the suit, it doesn't lie in your mouth to complain that they got the benefit of a suit to which they were not made parties'."

The decree of the District Court involved in *Young* v. *Powell* and the decree in the instant case are substantially similar in all material respects and the decisions are in direct conflict. The facts are even similar on the question of indispensable parties. In both cases the suit was brought by a person interested in the estate of a decedent in order to realize an asset for the estate, and other parties interested in the estate (including the executor or administrator) whose presence would have destroyed the jurisdiction did not become parties. In *Young* v. *Powell* the assets claimed on behalf of the estate were the subject of certain *inter vivos* dispositions by the decedent which were to be set aside. In the instant case the asset was a portion of the corpus of a testamentary trust which was being held by the trustee under an interpretation of the will which excluded the claimant estate. In both cases the decree could have stated that it was only an adjudication of the issue for purposes of the actual plaintiff. Instead,

in *Young* v. *Powell* the decision was in favor of the estate and the defendant was ordered to pay to the estate for distribution in accordance with the will of the decedent and the court decreed that the real estate was part of the estate. Similarly, in the instant case the court decreed that the estate had an interest and that plaintiff had created interests for absent parties who might share in the relief upon a proper contribution to plaintiff's expenses and attorney's fees. (The court apparently had in mind an application of the Illinois law permitting the awarding of fees for attorneys for a plaintiff who brings a fund into court.)

(d) In Holding That the Absent Parties-Plaintiff Were Not Indispensable the Decision Improperly Extends Diversity Jurisdiction Far Beyond Previous Limits.

The decision of the Court of Appeals in sustaining the jurisdiction of the District Court in the absence of indispensable parties is in conflict with numerous decisions of this Court and in other circuits as shown hereafter. The decision violates the rule as to indispensable parties. It also violates the rule as to diversity of citizenship since there were indispensable parties interested as plaintiffs who were citizens of Illinois.

The Decision May Be Taken as Holding That Lack of Jurisdiction Is Cured by a Decision Favorable to Absent Parties.

In considering whether parties are indispensable, it must be assumed that the decision on the merits may be either way. The double tests stated in *Shields* v. *Barrow*, 17 How. (58 U. S.) 130, 139, that parties are indispensable if any decree will either affect their interests or leave the controversy in a condition contrary to equity and good conscience, must be applied both to a decision favorable to the plaintiff and one against the plaintiff. Lack of juris-

diction is not cured by a decision favorable to the absent parties because jurisdiction is by definition a condition precedent. *Young* v. *Powell, supra, Calcote* v. *Texas Pacific Co.*, 157 F. 2d 216 (C. C. A. 5th, 1946, cert. den. 329 U. S. 728, 830). See discussion of mutuality and authorities cited, *supra*.

Yet the decision of the Court of Appeals has the effect of announcing the contrary rule. The decision can only be rationalized on this ground since it is clear that there was no jurisdiction to construe the will against the absent interests.

Whether Plaintiff's Interests Are Separable From Those of Absent Parties.

If the interests are not separable the absent parties are indispensable and it is considered that any decree will affect the absent interests. It does not matter that the decree could explicitly state that it is only an adjudication with respect to the actual plaintiff. If this were an answer there would be no such thing as indispenable parties-plaintiff because any decree could provide that it was only a determination between present parties and did not affect absent parties. Where the decree of itself, if adverse, would be not merely a precedent* against the similar claim of absent plaintiffs but would cast a cloud on their title or claim, the plaintiff is not entitled to a self-contradictory decree. A contrary rule would breed litigation over the scope and interpretation of particular decrees.

Decisions involving heirs or distributees must be ana-

* Any decree in a case such as this would, of course, be much more than a precedent in the usual sense. It is a decision of the very issues before the court in a later suit. As a practical matter the positions of the parties to the second suit are seriously prejudiced and to say that their interests are not affected is to ignore the practical consequences.

lyzed to determine whether the claim of the plaintiff was individual or whether it was in effect a single claim of the estate or all of the heirs. There is an obvious difference between a claim of an heir against the administrator for distribution of his aliquot share, which may be called a one-stage case, and cases of a claim by an heir against a third person who owed money to the decedent or holds property said to belong to the decedent or his estate. This is a two-stage case. The rights of the heirs stem from the decedent and in substance are rights of the estate or derivative rights.

The three instances, *Horn* v. *Lockhart*, 17 Wall. (84 U. S.) 570, *Payne* v. *Hook*, 7 Wall. (74 U. S.) 425, and *Waterman* v. *Canal-Louisiana Bank Co., supra*, 215 U. S. 33, in which this Court has held the interests of heirs separable are all one-stage cases, or suits by an heir against the person administering the estate.

Young v. *Powell* is a two-stage case where an heir sued a third person said to have obtained gifts from the decedent by undue influence. (The third person merely happened to be the same individual as the administrator.) The same is true of *Crutcher* v. *Joyce*, 134 F. (2d) 809 (C. C. A. 10, 1943).

The instant case is, of course, a two-stage suit. The right asserted by the plaintiff as heir of Stanley Young against the Otto Young trust estate is essentially the right of Stanley Young as the owner of a vested interest. These decisions in the Fifth, Tenth, and Seventh Circuits are in direct conflict. See *supra* the comparison of facts here and in *Young* v. *Powell*.

While the above goes primarily to the question whether the other persons interested in the estate of Stanley Young were indispensable parties on the vesting question,* there

* It should be noted, however, that Stanley was an heir of Otto Young Heyworth. Hence plaintiff also claims a fractional share through the Heyworth estate or as a co-heir with the Heyworths.

is an additional reason why they were indispensable and this applies also to the persons interested in the estate of Otto Young Heyworth. This is that the suit was to establish an interest in a trust by construing a will and all persons entitled under the asserted construction have joint interests the same as in a suit to cancel or construe a contract. The case as to the Stanley Young heirs is distinguishable from the three Supreme Court decisions mentioned above, and is stronger than *Young* v. *Powell*, because it involves both (a) a suit by one of several heirs against a third person and (b) a construction of a will, as well as the determination of the right of the trustee to continue.

The decision below accordingly is also contrary to decisions of this Court holding that in a suit to cancel a contract the interests of persons occupying the same position in the contract as the plaintiff are not separable and that they must be parties even though their presence would defeat the jurisdiction. *Shields, et al.* v. *Barrow, supra*, 17 How. (58 U. S.) 130, so held with respect to a bill to set aside a compromise contract, and *Gregory* v. *Stetson*, 133 U. S. 579, so held with respect to a contract of bailment. Similarly *Commonwealth Trust Company* v. *Smith*, 266 U. S. 152, with respect to separate contracts concerning water rights. Similar decisions in the Fifth Circuit concerning mineral contracts are *Vincent Oil Co.* v. *Gulf Refining Co.*, 195 F. 434, and *Keegan* v. *Humble Oil Co.*, 155 F. (2d) 971. The Sixth Circuit held to the same effect in *Kentucky Natural Gas Corporation* v. *Duggins*, 165 F. (2d) 1011, which also held co-heirs indispensable.

The construction of a will, or trust contract or agreement, whereby a provision of the instrument creating the trust is construed in favor of one group of persons rather than another is indistinguishable from actions involving contracts generally. In neither case can the meaning or

effect of the written instrument and the obligations of the trustee or contract obligor be one thing as to some members of a group and something else as to others. (It was so held even with respect to a deed in *Young* v. *Powell.*)

In the construction of a trust instrument, as here, the court determines the ownership of property. The ownership should not be determined to the limited extent of establishing the rights of one person. The entry of a decree where some interested parties are absent cannot be a determination even of the rights of *present* parties in the fund, or between present beneficiaries and the trustee. The decision of the District Court could not properly establish as to the defendant grandchildren that they have vested interests.* In a subsequent suit in a state court with all parties present it might be held that the interests are contingent, and this decision, rather than the federal decision, would establish the status of the beneficiaries and their rights *in rem* in the trust fund or as between themselves and the trustee.

Other decisions which conflict with the decision of the Court of Appeals are *Armstrong* v. *Lear,* 8 Peters (33 U. S.) 52, *Board of Trustees of Oberlin College* v. *Blair,* 70 F. 414 (C. C. W. Va.), *Franz* v. *Buder,* 11 F. (2d) 854 (C. C. A. 8, 1926), cert. den. 273 U. S. 756, and *Baird* v. *Peoples Bank & Trust Co.,* 120 F. (2d) 1001 (C. C. A. 3, 1941), the last two cases involving a trust. Also the decision of course conflicts with decisions following state law

* Upon the death of a grandchild, such as this petitioner, without issue, the trustee could not even recognize the right of the estate of the deceased grandchild in the trust corpus. Neither this petitioner nor the other defendant grandchildren would know whether they have interests which they could assign or pledge. Upon the death of a grandchild before termination of the trust the determination of the federal estate tax and state inheritance tax will involve the question whether the interest was vested and the decree will not have been a conclusive adjudication for this purpose.

such as *Young* v. *Garrett,* 149 F. (2d) 223 (C. C. A. 8).

The decisions recognize that absent parties are indispensable when their interests are bound up with plaintiff's interest. *Roos* v. *Texas Company,* 23 F. (2d) 171 (C. C. A. 2).

With respect to personal property, the fact is that the administrator of the estate of Stanley Young would hold title or be the proper claimant to the exclusion of heirs. While plaintiff's right of inheritance is limited to realty, the distinction between realty and personalty might not operate identically for the two purposes.

A Final Disposition Without All Parties Present as Inconsistent With Equity and Good Conscience.

If it were assumed *arguendo* that a final decision could be entered in this case which would not affect the interests of the absent parties, it is apparent that such a decree would leave the controversy in a condition "wholly inconsistent with equity and good conscience". This is another way of saying that the parties are indispensable in that jurisdiction could not be sustained unless by the fact that the decision was favorable.

The determination of when a controversy is left "in a condition inconsistent with equity and good conscience" is inherently a question of degree; but in no case has a court sustained jurisdiction where the relief was necessarily as incomplete and fragmentary as this. The District Court would be unable even to fix the share of the plaintiff in the trust, much less to divide the property. The interest of the estate of Stanley Young in the grandfather's trust would have been fixed on Stanley's death when the remainder became indefeasibly vested. The court, however, could not even determine the plaintiff's fractional interest in the trust. In order to do so the court would not merely have to determine that Stanley died

intestate and determine the heirship of Stanley Young, but since rights of inheritance are different as to real and personal property in Illinois (the widow getting all of the personalty), the court would have to determine to what extent the interest of Stanley's estate in the trust estate was real property or personal property. This involves the further question whether the determination is to be made as of the death of Stanley, the death of Otto Young or the termination of the trust, and whether various long-term leasehold interests (involving a substantial part of the estate—R. 290-293) are real or personal property for purposes of inheritance. Naturally none of these vital questions could be determined in the absence of the other persons interested in Stanley's estate.

No case will be found where the court strained to make diversity jurisdiction available to one person in a case such as this where: (a) there is a single plaintiff and no adjudication can be made of the rights of other persons having the same claim and larger interests; (b) the court cannot determine what is distributable to the plaintiff or even establish the size or amount of his claim but can only determine for him, in the abstract, the legal proposition on which a later claim could be based; (c) the absent parties are within the jurisdiction, could easily be served, and were once parties but were dismissed by plaintiff; (d) the subject matter, the construction of future interest limitations in a will, is one particularly within the province of state courts; (e) the result will necessarily be further litigation in which an opposite result is quite likely to be reached; (f) the "status" of present parties or their rights *in rem* as beneficiaries are left uncertain; (g) additional litigation would be likely over the very question of the extent and validity of the decree.

II.

BY CONSTRUING THE REMAINDER INTERESTS TO BE VESTED, THE COURT OF APPEALS HAS DECIDED AN IMPORTANT ISSUE OF LOCAL LAW IN A MANNER IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The requirement of adherence to local law is applicable in the construction of wills. Where there is a direct local precedent, or a local rule of construction directly applicable, the Federal court is bound to follow it. The enforcement of this requirement rests ultimately with this Court although it necessarily involves an examination of the local law to the extent required to make certain (1) that the alleged local decision or rule existed; (2) that the rule or decision was directly applicable on the facts; and (3) that the rule has not been changed by the local courts or the decision repudiated. In the instant case only the briefest examination into local law is necessary to establish (1) and (2) and little more is required for (3).

The opinions below naturally do not appear to defy the local law, but instead misstate the applicable local rule and assert that it has been repudiated. This results from the confusion of a specific local rule, which was directly applicable, with a different and unrelated general rule.

The will of Otto Young established a large trust fund and directed the trustee to distribute 88% of the income during the term of the trust. It also directed distribution of the corpus of his trust estate at a remote future time to his grandchildren and issue of deceased grandchildren. In this connection the will provided that issue of a deceased grandchild should receive "the share which such deceased grandchild would have been entitled to receive if then living" (R. 155). While his four daughters were then at a productive age, only seven infant grandchildren had so far been born. The number of grandchildren grew

after his death to eighteen and there are now sixteen living. The question presented is whether, if a grandchild dies without issue before termination of the trust, the estate of the deceased grandchild will be entitled to be counted as a grandchild and to receive a share of the corpus on final distribution or whether instead the fund will be divided only among living persons.

During the course of the litigation the defendants conceded, and this petitioner now concedes, that Illinois follows the general rule, as stated in the Property Law Re-Statement (Future Interests, Sec. 254), that the existence of a substitutional gift to issue of a beneficiary who dies does not of itself import a requirement that the beneficiary must survive or indicate what happens if the beneficiary dies without issue. A contrary rule obtains in some states based on the fact that the existence of the gift to issue removes any practical necessity for the interest of the parent being vested, because the children of the beneficiary are protected. The Court of Appeals mistakenly regarded this as the central issue.

In some instances a will in providing for the substitutional gift to issue will state that the issue are to receive the share which the parent "would have taken if then living," or words of similar import. A different question then arises, which is whether these words create a requirement as to the parent that he must be living in order to take, the same as if they had appeared as a part of the initial words stating the gift to the parent (See Restatement, *supra*, Sec. 250). It can be argued that the words merely state a truism, or refer to actual enjoyment rather than vesting in interest, and that they should be at most one element to be weighed in ascertaining intention. The Illinois courts, however, have established and consistently followed the rule that such an expression of contingency in the gift to issue (as contrasted with a mere reference to

issue taking a "parent's share") has the effect of a direct statement of contingency in the gift to the parent and is therefore effective of itself to make the interest of the parent contingent on the parent surviving the time mentioned without regard to rules of construction dealing with the implication of a requirement of survival where none is expressed. There is no inconsistency whatever between this particular rule and the general rule mentioned in the previous paragraph, but the Court of Appeals nevertheless confused the two.

In the leading Illinois case establishing this particular rule, *People* v. *Byrd*, 253 Ill. 223 (1911), Mr. Albert M. Kales was the attorney for the parties contending for a vested construction and argued that the words "if living at her death" appearing in the reference to the share of the parent in the gift to issue should be disregarded. The Illinois Supreme Court, however, after having had the benefit of Mr. Kales' arguments, rejected them and held that the words were a direct statement of a requirement that the parent be living. Mr. Kales subsequently stated his position and criticized the decision in his text "Estates and Future Interests" (2nd ed., 1920) Sec. 521.*

The opinion below indicates that the Court of Appeals has not been persuaded by Mr. Kales to reject the rule, which it could not do, so much as it has misunderstood it.

The Court's confusion of the two rules is apparent from the fact that all of the cases cited in the opinion as either being like the *Byrd* case, but since repudiated, or as being contrary to the *Byrd* case, contained no words of contingency or survivorship in referring to the parent in the description of the share of the issue. Instead the share was described in neutral terms, usually "parent's share."

* Kales' text however recognizes the distinction between the particular rule, which is criticized in Sec. 521, and the general rule, which is discussed in Secs. 519 and 520.

The conflict between the majority decision of the Court of Appeals and *People* v. *Byrd* is obvious when the clauses in the two wills and the statements with respect thereto contained in the two opinions are laid side by side.

Byrd	Young (de Korwin)
Provisions in Will	
(On death of wife) to testator's children. "• • • the issue of the child so dying shall take the share which his, her or their parent would have taken if living at her death." (253 Ill. at p. 226.)	(On death of last surviving daughter and youngest grandchild attaining 21 years) trust corpus to be divided among testator's grandchildren "• • • the surviving issue of any deceased grandchild • • • to receive the share which such deceased grandchild would have been entitled to receive if then living." (R. 155.)
Opinion	
"• • • we think that the intention of the testator is so clearly expressed • • • that it is possible to understand it without resorting to technical rules of construction. • • • The words 'if living at her death' clearly indicate that a child must be living at her death, that is, the death of the widow, in order to take under the will." (253 Ill. at p. 228.)	"We are of the opinion that this clause contains no such clear expression of the testator's intent as to enable a court to say, without resort to precedent or rules of construction, that the remainders thereby created are contingent. • • • We think the language quoted is merely descriptive of the 'share' the surviving issue of a deceased grandchild are to take and that it is another way of saying that the distribution is to be *per stirpes.*" (R. 485.)

Thus the *Byrd* case held that the words "if living at her death" made resort to decisions establishing rules of

construction unnecessary. The Court of Appeals held precisely the opposite and decided the case on the authority of decisions not involving these words.

The *Byrd* decision states a specific though narrow rule which has arisen frequently in the construction of wills in Illinois and has been consistently adhered to by the Illinois courts. The rule was in fact applied a few years before the *Byrd* case in *Cummings* v. *Hamilton,* 220 Ill. 480 (1906), which involved different but analogous language. There the gift to issue was of the share which "would have vested in the parent if then living."

The rule has been applied and approved a number of times since 1915. It was applied as late as 1942 in *White* v. *White,* 312 Ill. App. 628, and was applied by the Court of Appeals itself in 1918 in its prior decision in *Graff* v. *Rankin,* 250 F. 150 (1918), which was not even mentioned in the opinion below. In *Graff* v. *Rankin* the phrase containing the gift to issue stated that they were "to be entitled to the same share that his or her parent would have been if then living." The court, relying on *People* v. *Byrd,* said that these words were "deemed sufficient to indicate an intent that only such children and issue of deceased children as survive the life tenant shall take." In addition the rule has been approved and the *Byrd* case cited in other Illinois cases which did not actually involve the rule such as *Fleshner* v. *Fleshner,* 378 Ill. 536 (1942).

There are basically only two reasons indicated in the opinion below for the court's refusal to apply the *Byrd* rule. One is the significance attached to *Warrington* v. *Chester,* 294 Ill. 524 (1920), which will be discussed later. The other is the confusion between the specific *Byrd* rule and the general rule as to the ineffectiveness of a gift to issue to make the interest of the parent contingent. There are two manifestations of this confusion in the opinion.

The first manifestation of the Court of Appeals' confusion of the two rules is that it regarded the *Byrd* decision as influenced by or identified with cases decided before 1915 supposedly holding that a gift over to issue makes the prior gift to the parent contingent on his surviving. The cases referred to are *Bates* v. *Gillett, Spengler* v. *Kuhn,* and *Brownback* v. *Kiester.* In these cases the reference to the parent's share in the gift to issue did not contain words of contingency. Instead the description was as follows: *Bates* v. *Gillett,* "one share"; *Spengler* v. *Kuhn,* "deceased child's share"; *Brownback* v. *Kiester,* "share of other parent". The decision in the cases was not even rested on the existence of the gift to issue. The *Byrd* decision did not cite or rely on these cases, nor in fact any other cases whatever.

Also such cases were at all times before 1915 outweighed by contrary cases.* The majority opinion itself notices three such cases, *Siddons* v. *Cockrell,* 31 Ill. 653 (1890); *Knight* v. *Pottgieser,* 176 Ill. 368 (1890) and *Northern Trust Co.* v. *Wheaton,* 294 Ill. 606 (1911). Actually, as appeared in the briefs there had been six such cases decided at the time of the *Byrd* case in 1911, including *Smith* v. *West,* 103 Ill. 332 (1882), *Orr* v. *Yates,* 209 Ill. 222 (1904), and *Pingrey* v. *Rulon,* 246 Ill. 109 (1910). The *Pingrey* and *Northern Trust* cases were decided immediately before the *Byrd* case and after any of the other cases.

The *Northern Trust* case was decided eight months before the *Byrd* case by exactly the same court and with the opinion written by the same justice. Both were unanimous decisions.

---

* *Bates* v. *Gillett,* and the other two cases were suggested by plaintiff's counsel in an unwarranted, if not calculated, "confession" of adverse cases before 1915. The District Court referred to them as a minority line of cases but was in error in intimating that the *Byrd* case relied on them. The statement in the District Court opinion that some of the defendants relied on these cases or their "principle" was incorrect.

Hence, it is obvious that the *Byrd* case was decided on the language of the substitutional gift rather than the then existing case law as to the general effect of a substitutional gift to issue.

The Court of Appeals in 1918 in *Graff* v. *Rankin*, 250 F. 150, was not deceived as to the nature of the decision in *People* v. *Byrd* and followed its specific rule although the six cases holding the interests contingent had grown to nine and the supposed change of law referred to by the court in the instant opinion as having occurred in 1915 had taken place.

The second aspect of the court's confusion of the two rules is, as indicated above, the reference to numerous cases decided since 1915 as though those cases involved either the same language or the same rule as *People* v. *Byrd*. These cases again merely announced the admitted rule that the existence of a substitutional gift to issue of a deceased beneficiary does not make the interest of the beneficiary contingent on his survival. None of the cases contained words of contingency as to the parent in describing the share of his issue such as the words in *People* v. *Byrd*, "the share which his, her or their parent would have taken if living at her death", or the equivalent words in *Cummings* v. *Hamilton*, *Graff* v. *Rankin*, *White* v. *White* and in the Otto Young will.

The actual language of the cases cited by the Court may be noted for comparison: *Siddons* v. *Cockrell*, "parent's share"; *Remmers* v. *Remmers*, "shares of their deceased parents"; *McBride* v. *Clemons*, "their parent's share"; *Weberpals* v. *Jenny*, "share of such deceased child"; *Boyd* v. *Boyd*, "its or their parent's portion"; *People* v. *Allen*, "its or their parent's share"; *Smith* v. *Shepard*, "their parent's share"; *Hodam* v. *Jordan*, "the same".

The second ground for the court's rejection of *People* v.

Byrd is the assertion that the case is inconsistent with the later decision in *Warrington* v. *Chester*, 294 Ill. 524 (1920). This is the only instance in which the court appears to appreciate the fact that the *Byrd* case involved the words "if then living."

The language involved in *Warrington* v. *Chester* was not, as the opinion below states "substantially identical" to the language in the *Byrd* case. Neither the words "if living" in *Warrington* v. *Chester* nor any other words indicate the time referred to. This greatly weakens the inference that the words "if living" are intended to be an expression of a requirement of survivorship. Also it leaves the provision ambiguous as to whether, if a requirement of survival was intended, it would not be satisfied by the beneficiary merely surviving the testator. There is a strong preference in Illinois for construing gifts to persons "living" or "surviving" as meaning merely surviving the testator where no later time is indicated. See *Peadro* v. *Peadro*, 400 Ill. 482. This would be particularly applicable in the *Warrington* case where the gift of the remainder was worded as an immediate gift in the words "I give, devise and bequeath."

Until the instant case *Warrington* v. *Chester* had never been referred to in any later decision or any text as having any bearing on the *Byrd* rule. *Warrington* v. *Chester* did not refer to the *Byrd* case, *Cummings* v. *Hamilton* or *Graff* v. *Rankin*, even for purposes of distinguishing the language.

This is due in part to the fact that the remarks of the court in *Warrington* v. *Chester* as to the interest being vested were volunteered in the opinion as *dicta* without the point being in issue or having been argued. The *Byrd* case was not cited in the briefs. There was no question as to whether any interest was contingent on survival. There was a substitutional gift to the daughter of a deceased

beneficiary and the question was whether the share of the daughter could be charged with advances which the trustee had presumed to make to her father before his death. The court held that the share of the daughter could not be so charged, or in other words that the father had no interest which justified advances to him from the trust fund, but instead the substitutional gift was effective and the daughter took directly. For the purpose perhaps of making clear the unqualified nature of the holding as one applicable even though the father had a vested interest subject to being divested, the court volunteered the statement that the interest was in fact vested.

Aside from the gift to issue in the Otto Young will and the words "if then living" the strongest sort of case was presented for the implication of a requirement of survival as to grandchildren. It is hardly even a question of *implying* such a requirement because the will directs the trustee to distribute the trust fund to the testator's grandchildren at a remote future time and if the words are taken literally, only living persons would be "grandchildren." The testator in making a will was not thinking of specific grandchildren because only a few had then been born. The gift was to "uncertain persons" at an "uncertain time." It is also within the rule that there is a requirement of survival where futurity is annexed to the substance of the gift. Simes, Law of Future Interests, Section 351. The disposition is a class gift in a direction to divide and distribute at a future time, thus presenting the strongest case for the divide and pay over rule, which is in force in Illinois, *Thomas* v. *Pullman Trust & Savings Bank*, 371 Ill. 577, 585.

By way of contrast it may be noted that not one of the cases cited by the court involved a gift to a class contained in a direction to a trustee to distribute. Most of the cases involve a simple gift to named individuals.

Yet the Court of Appeals did not even notice that it

had before it a class gift or a case involving the divide and pay over rule. This is mentioned not for the purpose of invoking those rules on behalf of this petition but rather to make clear that there was no extraneous reason why the *Byrd* rule shall not have been applied. The court in addition to confusing the *Byrd* rule with the rule as to the effect of a gift to issue, almost seems to have assumed that the presence of a gift to issue somehow *prevents* the gift to the parent being contingent.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals for the Seventh Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket Nos. 9958, 9959 and 9960, *Margaret de Korwin, individually and as Executrix of the Will of Joseph Maria de Korwin, Deceased, Plaintiff-Appellee* v. *respectively, The First National Bank of Chicago, etc., Gwendolyn Young Heyworth Koch, and Marie Julia Young Kaufman Pratt, et al., Defendants-Appellants,* and that the judgments of the Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioners will ever pray.

GWENDOLYN YOUNG HEYWORTH KOCH,
By CRANSTON SPRAY,
WINFIELD T. DURBIN,
Attorneys for Gwendolyn Young Heyworth Koch.

Of Counsel:
MACLEISH, SPRAY, PRICE & UNDERWOOD,
134 South La Salle Street,
Chicago 3, Illinois.